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# Written statement* submitted by Franciscans International, a non-governmental organization with general consultative status

The Secretary-General has received the following written statement which is circulated in accordance with Economic and Social Council resolution 1996/31.

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## Introductory Remarks

On June 25, 2014 the UN Human Rights Council (HRC) in Geneva adopted - by majority vote - Resolution 26/9 on the elaboration of an international legally binding instrument on transnational corporations (TNCs) and other business enterprises with respect to human rights. After more than three decades of initiatives, voluntary commitments, and global campaigns, the adoption of this resolution represents a concrete measure in the fight against corporate impunity and the lack of accountability for corporate human rights abuses. Unregulated economic globalization and unscrupulous business practices systematically challenge human rights. Human rights abuses by corporations are becoming pandemic. During the second UN Forum on Business and Human Rights in December 2013, the Nobel Prize laureate Joseph Stiglitz stressed the need for "stronger norms, clearer understandings of what is acceptable—and what is not—and stronger laws and regulations to ensure that those that do not behave in ways that are consistent with these norms are held accountable."[1]

Resolution 26/9 calls for the establishment of an Intergovernmental Working Group (IGWG) with the mandate to elaborate the international instrument. Through the establishment of an IGWG, States will discuss the content and the scope of such an instrument (hereinafter the Treaty) in an open, transparent, and participatory process, in which civil society will have the opportunity to engage. The first two sessions of the IGWG will be dedicated to constructive dialogue on the content, scope, nature, and form of a future treaty on business and human rights.

### General Assessment

As a result of economic globalization, we have observed ever increasing international division of labour and fragmentation of business enterprises into myriads of single legal entities operating in each continent. This fragmentation and internationalization of business is compounded by a development model based on opening developing countries' economies to unscrupulous foreign investment and unchecked business, attracting foreign capital for fast profits in a race to the bottom.

Communities and individuals continue to suffer from environmental degradation, social conflict, inequality, landlessness, precarious working conditions, discrimination, violence, and denial of access to justice. This indicates that more robust regulatory and accountability mechanisms are needed and overdue. The global south is disproportionately affected by business-related human rights abuses. Binding, uniform international standards for TNCs and other companies will promote business behaviour that is more respectful of the human rights of all people.

Franciscans International (FI) advocated in favor of the adoption of Resolution 26/9. FI's monitoring and investigation of cases in more than 30 countries allows us to conclude that existing voluntary measures are ineffective. FI's call for an international treaty responds to demands coming from our partners, grassroots movements, indigenous peoples, peasants, workers, and others whose rights are affected by business activities.

Franciscans International has consistently denounced the adverse effects that extractive industries, agri-business, and other development mega-projects have had on local communities, indigenous peoples, human rights defenders, women, children, and other marginalized groups. By negative impact we refer to the consequences on peoples' full enjoyment of their human rights at any stage of business activity. Widely documented abuses include infringements on the rights to life and physical integrity, the right to freedom of expression, right to health, right to water and sanitation, right to food, right to housing, right to livelihood, right to cultural life, and right to non-discrimination. The disruption of the social fabric and environmental degradation are among the most frequently cited negative impacts, together with repression, violence, and killings of those who oppose or are critical of development projects. In many cases, armed conflicts and civilian victims accompany disputes over natural resources. Unchecked business also entails practices of forced labour and the phenomenon of human trafficking – with child victims in both.

[1] Joseph E. Stiglitz's keynote speech to panel on Defending Human Rights, Geneva, December 3, 2013.

## Relation to the Guiding Principles

We see gaps in the UN Guiding Principles on Business and Human Rights and have observed that in this case good intentions have not translated into concrete change for local communities. Nonetheless, Franciscans International asserts that the development of a treaty in the field of business and human rights does not interfere with the implementation of the Guiding Principles. The Treaty and the Guiding Principles would not conflict: the two processes are complementary and mutually reinforcing. The Treaty process will build on the way already paved by the Guiding Principles and fill in the gaps. The Guiding Principles helped shape a common language in the field of business and human rights and some elements should inspire the work of the IGWG, in particular with regard to prevention and due diligence.

## Terminology

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| Business enterprises:[2] | By the term "business enterprises," we refer to any business entity with a designated business purpose regardless of the international or domestic nature, including but not limited to corporations (including transnational), contractors, subcontractors, suppliers, licensees, and distributors. This includes any legal form that business entities can establish, including corporations, partnerships, sole proprietorships, and cooperatives. We also include any economic form, irrespective of its legal personality, that they can establish such as groups of enterprises, undertakings and joint ventures. In the text, the term "business enterprise" is interchanged with "companies". |
| Human rights: | By the term "human rights", we refer to all internationally recognized human rights, including the rights contained in the core human rights instruments as well as the principles concerning fundamental rights in the ILO Core Conventions. |
| Treaty: | By the term "Treaty" we refer to an international legally binding instrument. |

## General Recommendations

The process and outcome of elaborating a treaty on business and human rights must contribute to the effective protection of individuals and communities affected or threatened by companies. Franciscans International recommends that the IGWG chair, members, and observers ground the content of the Treaty in the reality and experiences of affected people and communities.

The objective of a treaty in the field of business and human rights should be to further strengthen States' obligations in international human rights law with respect to human rights abuses committed by business enterprises. The main role of a treaty should be to complement and enhance the existing framework, fill in governance gaps, and increase accountability for the corporate sector. The principles of universality, indivisibility, and interdependence of all human rights should be adequately guaranteed by the Treaty. The Treaty should be informed by the human-rights principles of empowerment and agency, transparency, participation, inclusion, non-discrimination, and equality.

The Treaty should:

Establish effective mechanisms to prevent, investigate, punish, and remedy corporate abuses, including access to justice for affected people.

Address corporate impunity in situations where the State is not able or not willing to uphold its duty to protect.

[2] As also used in the terminology of the Guiding Principles.

Require States to enact policies that ensure that business enterprises respect human rights and act with mandatory due diligence.

Ensure that States fulfil human rights using all appropriate means, including through national legislation and international cooperation.

## On the Scope

### Duty-bearers

The primary responsibility to promote and protect human rights lies with the State. States must protect against human rights abuses by third parties, including TNCs and other business enterprises. It follows that the Treaty should set out clear obligations for States and require States to enact appropriate policies and regulations to ensure prevention of abuses, accountability for business companies, and remedies for victims.

International law, and especially international human rights law, has traditionally had States as the only treaty parties and duty-bearers. Under this treaty States will be responsible to ensure that business enterprises respect human rights through national legislations and policies. The implementation of an international treaty requires the power, authority, and regulation that are inherent to States.

### Broad Coverage: TNCs and Other Business Enterprises

Resolution 26/9 gives the IGWG the mandate to "elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises." With a footnote in the preamble, the definition of "other business enterprises" is limited to those that have a transnational character in their operational activities, thereby excluding local business.

There are significant gaps in human rights protection due to the lack of regulation and accountability of TNCs as well as to the ineffective application of human rights law to development, investment, and trade agreements. TNCs are cross-border by nature and have a high degree of mobility and fluidity in relation to the country of incorporation, production, management, and financial investment. Their role in the global market is increasing and TNCs are able to escape accountability by placing themselves in-between legislations, taking advantage of territorial limitations of jurisdictions, and forum shopping best to protect their interests. Therefore differential consideration of the modus operandi of TNCs should be clearly addressed as one of the main elements within the scope of the Treaty.

However, a Treaty that focuses only on TNCs would fail to effectively address the reality of the global phenomenon and thus fail to effectively fill governance gaps and protect all victims from abuses committed by business enterprises. Limiting the scope of the Treaty to TNCs would undermine the very objectives of the Treaty. Several argument support that the Treaty scope must include all business enterprises.

The human rights principle of non-discrimination requires that all business enterprises, irrespective of their size, sector, and the domestic or global nature of their operations be held responsible for respecting human rights throughout their operations. Victims of abuses by local business companies are entitled to the same human rights protection as victims of abuses by TNCs. In other words, if a legally binding instrument is developed for the purpose of protecting those who are negatively impacted by business activity, it should not matter whether the business enterprise is a TNC or a domestic company. For the victim, the form of corporate organization is irrelevant.
Much of what is referred to as "domestic business" is in fact part of a globalised chain and is fully integrated as a key piece of the international business architecture. Should domestic companies not fall under the scope of the Treaty, this would imply exclusion of the supply chain that feeds the international market but is technically considered national. If there are no rigorous provisions regarding human rights due diligence in the supply chain, those companies would fall outside the scope of the Treaty.

The size and magnitude of many domestic companies enable them to significantly shape policies for their own profit and advantage. Their impact on human rights can be comparable to TNCs.
Millions of people across the world, especially in jurisdictions with low enforcement of laws and regulations, experience human rights abuses in the workplace. Most domestic legal systems fail to adequately address issues of human rights abuses by business enterprises. The Treaty could serve to create a level playing field and fill in national governance gaps.

**Forced labour in the garment industry**
In the global garment industry, TNCs organize their production so that through subcontracting and outsourcing, local and informal workshops are incorporated in the supply chain. Where labour conditions are analogous to slavery and the employees' safety is mostly disregarded, the big retailers do not conduct human rights due diligence throughout the supply chain. They appear unwilling or unable to effectively trace their supply chain, or claim not to know the circumstances in which the garments are made. By demanding production at such low cost, retailers in effect oblige their producers to contract those local producers that can deliver at the lowest cost, often those with the greater disregard for human rights. Through organizational and fiscal structures, the big retailer avoids its duty to ensure human rights compliance in its supply chain, while domestic companies are pressured to engage in practices abusing rights and amounting to slavery to stay in business. To ensure the Treaty covers not only those big retailers buying from local factories and workshop, but also the owners of these local factories and workshops, the scope needs to extend to include all business enterprises.

**Slavery and exploitation in the agricultural sector, the case of tomatoes**
In the agricultural sector of many countries, in particular in Southern Europe, the harvest of tomatoes is done by migrant workers. Large industries of tomato production feed into the global market of canned tomato, pizza sauce, and ready-made food for big food corporations, including TNCs. Their work is governed by the so-called *caporalato* phenomenon. Farm owners hire a *caporale* – a supervisor who is charged with the task to employ unskilled and cheap labourers. The caporale makes agreements with such workers, and the workers are subsequently fully dependent on the caporale with regards to their living conditions, transportation to the fields, and food. In the majority of cases, this form of agricultural industry entails the following abuses: forced labor; trafficking; debt bondage because of illegal recruitment fees; contracts substituted for inferior ones; travel documents and salary withheld; confinement; isolation and no communication; excessive hours without time off; physical or sexual abuse; and destruction of identification documents; illegal harassment and extortion; detention and abuse. For a caporale, it is favourable to work with immigrants who do not have a regular residence permit. In many countries illegal workers can be immediately expelled. Therefore, they are easily blackmailed and forced to accept very little pay and harsh working conditions. For these kind of abuses to be included the scope of the treaty should be extended to all business enterprises

## Broad Coverage: Universality, Indivisibility and Interdependence of Human Rights

The principles of universality, indivisibility, and interdependence of all human rights in business-related issues should be guaranteed in the Treaty. Because of the interlinkages of human rights abuses committed by business enterprises, a Treaty that would only cover gross human rights violations fails to ensure protection to all victims because it would exclude most of the human rights abuses committed by companies (including the adverse impact on rights to food, housing, water, health, self-determination, and adequate standard of living). In order to ensure full protection, the Treaty should refer to all human rights, including the impacts on lives and health of people caused by environmental damage.

## The Territorial Scope – Extraterritorial Jurisdiction

One of the main expectations for the Treaty is that it will extend the territorial scope outside national territories. Having considered the role of TNCs in the global market, their ability to escape accountability by taking advantage of limitations of territorial jurisdictions, and considering the geographical fragmentation and internationalization of the globalised business, we are convinced that any attempt to limit obligations territorially would lead to the failure to effectively protect human rights against corporate abuses.

States that condone or facilitate abuses committed by entities under their jurisdiction are complicit in those violations. The Treaty should aim at extending the obligations of States to protect human rights against any abuses committed by business enterprises outside their territories to address the impunity of TNCs for human rights abuses they commit or participate in.3

The Treaty should cover the two main and related types of extra-territorial jurisdiction, namely:
Prescriptive jurisdiction: The power of a State to regulate people, property, entities and transactions, or to prescribe conduct, usually through the passage of laws or regulations.
Adjudicatory jurisdiction: The power of a court to hear a case.4

A treaty should require States to empower their courts to exercise extraterritorial jurisdiction in order to ensure accountability of TNCs. With the obligation to guarantee access to justice and effective remedies for victims, the home States of TNCs will have a key role in combatting corporate impunity.

Extraterritorial jurisdiction will not interfere with States' efforts to implement their own territorial obligations. Rather it will facilitate such policies and act in complementarity when the State in which the abuse has occurred is unwilling or unable to react appropriately.

Through the inclusion of the extraterritorial component, the Treaty will ensure universal protection of human rights in the globalization process.

## Conclusions and Recommendations

The Treaty should:
Cover the entire range of human rights, including the rights contained in the core human rights instruments,5 as well as the principles concerning fundamental rights in the ILO Core Conventions. The principles of universality, indivisibility and interdependence of all human rights in business-related issues should be adequately guaranteed in the Treaty.
Have an extended scope to include all business enterprises—domestic, foreign, and transnational.
Aim at States as duty-bearers and require them to enact legislation and policies to ensure all business enterprises respect human rights.
Explicitly establish extraterritorial obligations of States.

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[3] For more, see Olivier de Schutter, Extraterritorial Jurisdiction as a tool for improving the Human Rights Accountability of Transnational Corporations (2006), http://198.170.85.29/Olivier-de-Schutter-report-for-SRSG-re-extraterritorial-jurisdiction-Dec-2006.pdf.

[4] Prescriptive and adjudicatory jurisdictions are inextricably interconnected. Prescriptive jurisdiction concretely implies adjudicative extraterritorial jurisdiction.

[5] See list of the Core International Human Rights Instruments and their monitoring bodies, available at http://www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx.

## Key Elements

### Prevention

The Treaty should clearly establish obligations of States to prevent human rights abuses by business enterprises.

States should require companies of a certain size and impact to adopt policies and procedures and other standards of conduct aimed at preventing, mitigating, monitoring, and accounting actual or potential adverse human rights impact related to their operations wherever they are carried out. States should also require companies to periodically report on due diligence processes and their impacts, including for parent companies to report on the global operations of the entire enterprise.6 States should ensure monitoring and compliance with due diligence process and ensure that those companies that do not observe these standards are held liable, and that remedies are available in cased where human rights abuses occur.

Preventive measures must include business operations taking place in countries other than the country where the business may be domiciled or headquartered.7

Mandatory due diligence process should apply to the complexity of structure of the TNCs and other companies, in particular to parent companies8 in relation to the activities of their subsidiaries (controlled companies). Mandatory due diligence should also apply to major retailers in their entire supply chain process.

Legislative Developments in France
The French National Assembly adopted a draft law requiring French multinationals to enact due diligence plans to prevent human rights and environmental abuses. Those companies that fail to engage in this due diligence process and plans would be ordered to do so by the judiciary and for persisting failures they will be fined for non-compliance.9 Unfortunately, the substantive provisions of the draft law were significantly watered down due to strong opposition by business lobbies. Consequently, a provision aimed at shifting the burden of proof in cases of corporate abuses involving French multinational companies was removed. The initial provision had placed the burden of proof on parent companies in terms of proving that they were not in fact in control of the activities of their subsidiaries and subcontractors. In addition, the law now would only apply to companies with more than 5,000 employees in France or 10,000 worldwide.

Slavery in the supply chain of prawns for large US and UK retailers
A recent investigation revealed Asian slave labour producing prawns for the global shrimp supply chain involving US and UK markets. This case illustrates one dimension of the complex supply chains that connect slavery to leading producers and retailers.10 In particular the investigation revealed Asian 'ghost ships' that enslave and kill workers. Slaves are forced to work in certain Asian countries for no pay for years under threat of extreme violence, in the production of seafood supplying large retailers in Western countries. The

[6] Guiding Principles: Principles 1 and 2.

[7] For example, in a recent communication of the Human Rights Committee to Canada, the Committee requested information regarding "measures taken or envisaged to monitor the human rights conduct of Canadian oil, mining, and gas companies operating abroad". Human Rights Committee, International Covenant on Civil and Political Rights, List of issues in relation to the sixth periodic report of Canada, UN doc. CCPR/C/CAN/Q/6 (21 Nov. 2014), para. 4.

[8] Parent companies are those corporations that own and entirely or partly control another company.

[9] Devoir de vigilance des multinationales: un "premier pas historique", France Info (Mar. 31, 2015), http://www.franceinfo.fr/actu/monde/article/devoir-de-vigilance-des-multinationales-un-premier-pas-historique-662601.

[10] Revealed: Asian slave labour producing prawns for supermarkets in US, UK, The Guardian (Jun. 10, 2014), http://www.theguardian.com/global-development/2014/jun/10/supermarket-prawns-thailand-produced-slave-labour.

investigation found that one of the world's largest prawn farming companies, buys fishmeal to feed to its farmed prawns from suppliers that own, operate, or buy from fishing boats (ghost ships) manned with slaves working in horrific conditions, including 20-hour shifts, regular beatings, and torture, and execution-style killings. These prawns are then sold to food distributors and international supermarkets, as well as food manufacturers and food retailers, as frozen or cooked prawns and ready-made meals. The company in question admitted that slave labour was part of its supply chain.

**Mandatory Human Rights Impact Assessment**

For businesses of a certain size, considering the scale of impact of their operations, an independent human rights and environmental impact assessment should be required prior to a proposed activity. The result of the independent assessment should guide future steps and operations of the business activity. This human rights and environmental assessment should be informed by the principles of transparency, participation, equality, inclusion, and non-discrimination. Assessments should be carried out by independent authorities and should place special attention on the impact on women and the role they play in the community and society. Both in terms of impact as well as the participatory process of the assessment, specific attention should be given to gender, marginalisation, poverty, and challenges faced by specific groups such as indigenous peoples, women, minorities, religious minorities, and children, persons with disability, migrant workers, and human rights defenders. The impact assessment should take into consideration specific risk factors that would lead to gender-based violence, sexual abuses, violence and repression of freedom of expression and association, disappearances and killings.

**Mandatory Consultation and Access to Participation**

Mandatory consultation and access to effective participation for potentially affected communities are critical to prevent harm, abuses, and conflict. Participation of potentially or actually affected communities should be meaningful and carried out in a manner that takes into account language, social, and hierarchical barriers for all sectors of the community. Participation and consultation obligations should be in line with the rights recognised by the UN Declaration on the Rights of Indigenous Peoples.

Preventive measures as applied to the extractive sector

The extractive sector is one of the most critical in terms of adverse human rights impact. Preventive measures are needed to avoid abuses, violence, killings, and social conflict involving local communities, indigenous peoples, peasants, women, and children.

Mining projects take place in different stages. Thorough human rights due diligence plans and processes must be conducted and strictly monitored throughout all stages. In particular, States should require extractive companies to adopt code of conducts that effectively identify, prevent, stop, and remedy abuses. Emphasis should be placed on States' obligations to determine its policy based on meaningful consultation processes with potentially or actually affected communities. Additionally, the plans must include measures to prevent involuntary resettlement and destructive practices, gender-based violence and discrimination, child labour, pollution and environmental damage, and on clear plans for rehabilitation after the end of the project.

An independent environmental and human rights impact assessment should be prepared at a very early stage to prevent, identify, and mitigate any harm. Public consultations should be carried out in a way that respects traditional customary rules and decision-making and these consultations must inform the assessment. At the conclusion of a project, a company should be held accountable for rehabilitation of the area so that the environment is recovered. The costs for this must be estimated by the assessment in advance, in consultation with independent experts, and secured by the company in a safe and ad-hoc fund for rehabilitation.

Another important element in preventing adverse environmental and human rights impact is the establishment of so-called "No Go Zones." This label refers to places in which it has been identified that extractive projects would pose too great risks to the natural and/or social environment. This type of land zoning ought to ban

extractive activities from certain lands for instance.

**Protection of Human Rights Defenders and Whistle Blowers**

Human rights defenders are a particularly vulnerable group in the context of human rights abuses by business companies or violations by State actors with the complicity of business companies. They often operate in a context where there is a strong collusion between the State and economic powers and where the authorities prioritise economic interests over the rights of the local population. Protests against corporate activity are often repressed with violence and excessive use of force, terrorist charges, preventive charges, killings, and disappearances. This happens with the direct or indirect complicity of the companies that defend their interest with the support of the State action or acquiescence.[11] Whistle blowers must also be protected. Many times those who denounce abuses occurring inside a business enterprise fear for their lives and jobs, and they have to cope with corruption and bribery.

The Treaty should explicitly require States to ensure an "enabling environment" for human rights defenders that oppose or denounce business activities or hazardous working conditions. This includes requiring States to refrain from criminalizing social and peaceful protest. The Treaty should also require States to protect human rights defenders from violence by police and private military and other security forces often put in place to defend the business and its interests. The physical and psychological integrity of human rights defenders should be guaranteed in all circumstances.

**Conclusions and Recommendations**

The Treaty should clearly establish obligations for States to prevent human rights abuses by all business enterprises States should require companies of a certain size and impact to adopt and periodically report on their policies and procedures and other standards of conduct aimed at preventing, mitigating, monitoring, and accounting for actual or potential adverse human rights impacts they cause or with which they are complicit, wherever they operate or cooperate.

Mandatory due diligence process should apply to parent companies in relation to the activities of their subsidiaries irrespective of where they operate. Parent companies should report on the global operations of the entire enterprise. Mandatory due diligence should also apply to companies of certain size in their entire supply chain.

States should ensure monitoring and compliance mechanisms for due diligence processes by ensuring enforcement of the legislation and ensure that those companies that do not observe these standards are judicially compelled to do so and failing that are held liable, and that remedies are available when human rights abuses occur.

For business enterprises of a certain size, considering the scale of impact of their operations, an independent human rights and environmental impact assessment should always be required prior to a proposed activity. Special attention should be placed on the impact on women and children in the prevention of human rights abuses. The impact assessment, in process and outcome, should pay special attention to challenges faced by specific groups such as indigenous peoples, minorities, and religious minorities, persons with disabilities, migrant workers, and human rights defenders.

States should ensure mandatory and meaningful consultation and participation of potentially affected communities in decision making, which is critical to prevent harm, abuses, and conflict. In specific sectors, such as extractive industries, States should ensure that companies do not undertake activities before obtaining the free, prior, and informed consent of the local community.

The State should protect those working on human rights concerns arising from business activities. Human rights defenders resisting or denouncing the impact of business activities must not be subjected to criminal sanctions, repression, intimidation, harassment, or murder.

[11] As also highlighted in: Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai. Human Rights Council, session 29, Paragraph 23 and 72(c)(iv). Ref. A/HRC/29/25.

In order to prevent human rights abuses, States should ensure respect of human rights in all trade, investment, and other business-related bilateral or multilateral agreements, treaties, and contracts with other states. A human rights based approach should be explicitly mentioned in such agreements and must prevail in case of conflict.

## Accountability

One of the main objectives of the Treaty is to engender legal liability for corporate abuses. Corporations may be directly or indirectly implicated in human rights abuses. Direct corporate involvement in human rights abuses include activities undertaken by the management or employees of the corporation, including torture, slavery, unlawful detention, disappearances, and intimidation of those opposing or denouncing corporate behaviours and activities. Business enterprises are also indirectly involved in a series of human rights abuses and this would include corporate complicity and contribution to human rights violations. In line with mandatory due diligence recommendations, the Treaty should also state that failures to observe human rights due diligence process lead to legal liability.

Failed attempts to address accountability gaps in Canada
In Canada there have been several legislative initiatives to fill accountability gaps for abuses committed by Canadian mining companies.12 Most recent was Bill C-300, the "Corporate Accountability of Mining, Oil, and Gas Corporations in Developing Counties Act".13 Bill C-300 would have withdrawn governmental support to companies violating human rights standards. The stated purpose of the Act was "to ensure that corporations engaged in mining, oil or gas activities and receiving support from the Government of Canada act in a manner consistent with international environmental best practices and with Canada's commitments to international human rights standards."14 The Act contained provisions related to codes of conduct for companies, clear criteria conditioning governmental support on compliance with those standards, and authority for the government to investigate acts of noncompliance. Unfortunately the Bill was narrowly defeated in October 2010 by a margin of only 6 votes.

### Direct involvement in human rights abuses

The Treaty should clearly provide for statutory cause of actions for human rights abuses committed by business enterprises.

The Treaty should define a list of key offenses with appropriate criminal, civil, and administrative liability for business enterprises (legal persons) and persons working for them (natural persons), and specify internationally recognized crimes against human rights. The Treaty should require States to prosecute corporations and their directors for those crimes.15 Corporate liability (for legal persons) should not prevent liability for natural persons (the employees of the company). Criminal proceedings should not prevent victims from seeking remedies according to civil remedies law.

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[12] *See* Working Group on Mining and Human Rights in Latin America, *El impacto de la mineria canadiense en América Latina y la responsabilidad de Canadá* (2013), pp. 102-04. See also Franciscans International, Canada's Mining Interests in Latin America, submission for Human Rights Committee 112th session (July 2014).

[13] House of Commons of Canada, Bill C-300, 2nd Session, 40th Parliament 57-58 Elizabeth II, 2009.

[14] *Id.* para. 3.

[15] For example, Article 3 of the Optional Protocol on the Sale of Children (OPSC) provides: "Subject to the provisions of its national law, each State Party shall take measures, where appropriate, to establish the liability of legal persons for offences established in paragraph 1 of the present article Subject to the legal principles of the State Party, such liability of legal persons may be criminal, civil or administrative." The offenses referred to in paragraph 1 are: sexual exploitation, transfer of organs, forced labour, illegal adoption of a child, child prostitution.

**Indirect involvement and complicity in human rights abuses**

In addition, the Treaty should also clarify cases in which business enterprises contribute to and participate in human rights abuses, including through omission or negligence, and define clear types of corporate complicity. Complicity should be understood as co-responsibility in criminal offences. This involves a set of indirect ways in which companies can have an adverse impact on rights through their relationships or ties.

There are different types and levels of complicity:
Active complicity: complicity in the commission of the offence.
Passive complicity: omissions and failures to act. This may occur when it may be beneficial for the company to remain silent (so-called silent complicity).

Complicity may occur when it is another entity that commits abuses and this entity (public or private, domiciled in the same country or abroad, with or without legal status) is "related" to the business enterprise in question. The definition of this "relationship" is key to establish liability. Complicity may include outsourcing and sub-contracting of services that involve human rights abuses or the involvement of business activities in a context where a State systematically violates human rights. It could involve subsidiaries, sub-contractors, suppliers, as well as other kinds of economic partnerships, undertakings, or group of enterprises, joint ventures, and any other kind of economic entity of which they may be part. Complicity also encompasses situations where the business enterprise directly or indirectly assists or benefits from human rights abuses committed by others.

**Legal liability and complexity of corporate structures**

The Treaty should clarify liability for human rights abuses in complex corporate structures, including the liability of the parent companies for abuses committed by the subsidiary. This is particularly crucial for TNCs. The two entities have separate legal entities and this separation (corporate veil) poses challenges for attributing legal responsibility to the parent company by isolating, fragmenting, and diluting the responsibilities of each entity.

To circumvent the barrier of the corporate veil, European litigators addressing overseas corporate human rights abuses have been applying the "duty of care" doctrine. According to the duty of care doctrine, responsibility is attributed to the parent company based on its omission or failure to exercise its duty of care vis-à-vis the activities carried out by its subsidiary. This doctrine has helped overcome jurisdiction challenges but has not allowed litigators to effectively pierce the corporate veil and hold the parent company liable.

A procedural challenge in relation to the application of the "duty of care" is the disclosure of documents to prove the connection between the parent company and its subsidiaries. When dealing with TNCs, information about the responsibility of the parent company for a given activity is often exclusively in the possession of the company itself. A possible solution to overcome this challenge would be to shift the burden of proof. Concretely, this could mean a presumption that the parent company was in control of its subsidiary unless otherwise proven. The Treaty should clarify cases in which the parent company will be presumed to be liable for abuses committed by its subsidiary.

**Conclusions and recommendations.**

The Treaty should:
Establish criminal, administrative, and civil liability for human rights abuses with a clear reference to all existing and recognised human rights, as expressed and guaranteed by international law, in the forms of treaties, customary international law, general principles, and other sources of international law.
Establish corporate criminal liability for certain severe human rights violations such as torture, slavery, and environmental damage and consequent harm to individuals or groups of individuals.
Ensure that corporate liability for legal persons does not prevent liability for natural persons.
Ensure that criminal proceedings do not prevent victims from seeking remedies according to civil law.
Clearly define liability for parent companies, including a presumption of negligence by the parent and causality links between the harm and the role of the parent company.
Identify and criminalize situations of complicity in an offence, including negligence and omission, as well as passive or silent complicity.

Establish liability in complex corporate structures such as the TNCs, as well as in context of joint ventures or groups of undertakings with separate legal status where the joint action is harmful.

## Remedies

The Treaty must require States to provide civil damage remedies for victims of human rights abuses in which business enterprises are involved.

When the activities of business enterprises cause harm individuals, communities, and workers should be able to seek remedies. Existing gaps in national and international legal regimes for holding business enterprises, in particular TNCs, accountable for their role in human rights abuses prevent victims from claiming damages and perpetuate corporate impunity. These obstacles range from the financial and legal obstacles to the complex legal structure of TNCs.

### Existing barriers related to seeking remedies

There are numerous interrelated procedural and practical challenges to bringing claims against corporations, in particular against TNCs:

Legal, jurisdictional, and procedural barriers.
Territorial limitations. As mentioned in previous paragraphs, in situations where host States are either unwilling or unable to provide access to justice for victims of human rights abuses, the extraterritorial jurisdiction is critical to ensure effective remedies for victims. A number of UN and expert recommendations have called for the extension of territorial jurisdiction in order to effectively guarantee access to justice for victims.16

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| Failed legislative attempts to ensure affective access to justice for victims of Canadian mining companies.17 There have been several failed legislative attempts to fill the legal gaps the keep victims from accessing justice in Canada. Bill C-323 (formerly C-354) was a legislative initiative launched in 2009 that aimed to amend the Federal Courts Act in the interest of international promotion and protection of human rights.18 It was an innovative bill modeled after the United States' Alien Torts Claim Act. If it had been approved, it would have expressly recognized the authority of the Federal Court system to order remedy for foreign victims of human rights violations, including genocide and torture, as well as environmental harms and violations of labor rights.19 |

Jurisdiction of courts. Victims' attempts to seek remedy in home State courts are frequently rejected on jurisdictional challenges.20 The general rule is that courts where the company is domiciled will have jurisdiction. This general rule is challenged however by the forum non-conveniens doctrine which allows a court to decline to exercise jurisdiction if a better forum exists. This doctrine is used frequently in the US, Canada, and Australia. Conversely in the European

[16] For a compilation of UN recommendations about extraterritorial obligations: http://www.etoconsortium.org/en/library/documents/

[17] For more information see: Franciscans International, Blue Planet Project of the Council of Canadians and the Mining Working Group at the UN: Joint submission on Canada 114th Session of the UN Human Rights Committee, Geneva, June 29-July 24, 2015

[18] See http://this.org/blog/2011/11/01/corporate-accountability-bill-c-323/.

[19] See, Charis Kamphuis, Canadian Mining Companies and Domestic Law Reform: A Critical Legal Account, German Law Journal, vol. 13, no. 9 (2012), p. 1473.

[20] *See* for example the cases from Canada highlighted in: Working Group on Mining and Human Rights in Latin America, *El impacto de la minería canadiense en América Latina y la responsabilidad de Canadá* (2013), pp. 112-13.

Union, as result of a decision by the European Court of Justice (ECJ),21 the doctrine of forum non conveniens has been abandoned.

| Precedent-setting court decision |
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| Three connected cases were brought against HudBay Minerals before the Ontario Supreme Court of Justice (Canada) for its imputed responsibility for violent acts in Guatemala, namely the rape of eleven indigenous women and the murder of an indigenous leader.22 In 2013 the Court took the precedent-setting decision to allow this lawsuit to be heard in Ontario, dismissing the company's attempts to have the case dismissed on jurisdictional grounds, inter alia. |

The complexity of corporate structures, including the corporate veil. The intricate structures and relationships of corporations often lead to the fragmentation of responsibilities through a system of "Chinese boxes." This fragmentation multiplies possibilities for choosing jurisdictions and hence allowing business enterprises to shop for the best forums for their corporate interests. As mentioned above, European litigators circumvent the corporate veil obstacle though the "duty of care" doctrine. However, this doctrine does not solve the barrier of the corporate veil. Piercing the corporate veil is rare in tort cases. The corporate veil is already lifted in some domains, like in EU antitrust law for example.23 The Treaty should clearly establish the circumstances in which the corporate veil is to be lifted and the parent company held directly liable. The Treaty should also provide for a presumption of negligence in the duty of care by the parent company in order to shift the burden of proof in favour of the victims.

Disclosure of documents to prove the connection between the parent company and its subsidiaries. When dealing with TNCs particularly, information as to which enterprise was responsible for a given activity is often exclusively in the possession of the company itself. Furthermore, the level of disclosure of documents varies across countries. While in the US there are extensive disclosure procedures that enable the claimant to have access to information that can be used in litigation, in most EU countries access to documents is extremely limited. In the UK, the general rule is the proportionate disclosure of documents. A possible solution to overcome this challenge would to shift the burden of proof: the Treaty could establish a presumption that the parent company was in control unless it can prove otherwise.

Gaps in legal codifications which lead to the situation where no cause of action exists for victims to make a claim and which thus make it impossible to achieve justice.

Statutes of limitation restrict the possibility for prosecution after a certain time period, thereby hindering access to justice and the fight against impunity. When the statute of limitations expires in a criminal case, the court no longer has jurisdiction.

| Italian court acquitted Eternit on the grounds of statute of limitations |
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| In November 2014, an Italian court declared an acquittal in the infamous Eternit case, which involved the deaths of hundreds of workers from asbestos poisoning. The acquittal was due to the statute of limitations, leaving the 263 victims and their families without redress. Prosecutors in Turin called for a new trial of Eternit's former owner. On February 13, 2012 the court found the defendants guilty of negligence and sentenced them to 16 years imprisonment. In June 2013 an Italian appeals court increased the sentence against a first defendant to 18 years in prison for causing the death of 3000 people. The court dropped charges against a second defendant |

[21] The European Court of Justice [ECJ] in its decision *Owusu v. Jackson* [Trading as "Villa Holidays Bal-Inn Villas" and others] foreclosed the use of the doctrine of "*forum non conveniens*" in United Kingdom Courts. See also art. 27 of EU Regulation so-called Brussels I.

[22] For more information see website Choc v HudBay Minerals Inc, http://www.chocversushudbay.com/.

[23] For example: The Parent-Subsidiary Relationship in EU Antitrust Law and the AEG Telefunken Presumption: Between the Effectiveness of Competition Law and the Protection of Fundamental Rights. Prof. Lorenzo Federico Pace, Università degli Studi del Molise - Facolta di Economia http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2536463

because he died in May 2013. On November 19, 2014, the Italian Supreme Court overturned the lower court's decision and acquitted the former on the grounds that the statute of limitations had passed.24

Unavailability of class or collective actions: these kinds of actions are not available in all legal systems.25 If class actions are denied, individual cases can be prohibitively expensive.
The quantification of damages. In some jurisdictions, the rules dealing with a harm suffered abroad provide that the local level of damages will apply. This is often very low in developing countries, and it does not translate into a real deterrent for companies. In addition, often the real costs and damages of business activities such as extractive activities are difficult to understand and recognized. Some damages may be difficult to quantify with standard tools of economics. For example, the loss of traditional livelihoods in hunting, fishing, and farming can rarely be traced and quantified.

Practical and financial barriers.
Magnitude of the imbalance between claimants and defendants. TNCs have sufficient means available to hire strong law firms, whereas victims mostly rely on small law firms which do not have similar funding.
Victims are discouraged by 'loser-pays rules' that exist in certain jurisdictions requiring the losing litigant to pay the legal costs incurred by the other party.
Other barriers.
Besides the above listed barriers, other external factors prevent victims from seeking and achieving remedies. Corruption, political interference, and fear of reprisals can hinder legal processes and deter victims' attempts to demand justice. If a court succeeds in deciding a case favourably, enforcement problems can still obstruct achieving justice.

**Conclusions and recommendations**

The Treaty should:
Require States to ensure that through judicial, administrative, legislative or other appropriate means, victims have access to effective judicial remedy.
Explicitly require States to exercise jurisdiction over human rights abuses committed by their companies outside their territories, in particular in situations where host states are either unwilling or unable to provide effective remedies for victims.
Establish the general rule that Courts have jurisdiction in the State where the company is domiciled.
Clearly establish the circumstances in which the corporate veil is lifted and the parent company is to be held liable.
Establish a presumption that the parent company was in control of its subsidiary and provide for the presumption of negligence in the duty of care by the parent company, in order to shift the burden of proofs in favour of the victims.
Require States to establish clear causes of actions. Causes of actions should not dictate any statute of limitations or other periods of prescription that endanger accountability and remedies.
Require States to establish the possibility for collective actions in their legal systems.
Damages should be adequately quantified taking into account the relevance of the damage for the victims. Sanctions should act as a deterrent for companies.
Clearly address any financial barriers such as the loser-pay-rules and the high overseas litigation costs by addressing the legal and procedural barriers that increase these costs.

[24] Stephan Schmidheiny, Eternit billionaire's asbestos jail term overturned, Nov. 20, 2014, http://www.swissinfo.ch/eng/eternit-billionaire-s-asbestos-jail-term-overturned/41125556.
[25] For example, while class actions are possible in Canada, US, South Africa and Australia, in Germany they would not be possible.

## Monitoring and Compliance – International Mutual Legal Assistance

**International monitoring**

To ensure compliance, an international monitoring and supervision provision should be included in the Treaty. The Treaty should establish an efficient and effective body for international supervision, empowered to monitor the implementation of the Treaty provisions. The monitoring body should require States to report periodically on the situation concerning abuses involving business enterprises under their jurisdictions. This body could play a key role in launching inquiries and in proposing specific investigation measures.

**International judicial cooperation and mutual legal assistance.**

International judicial cooperation and mutual legal assistance will be critical in international actions to effectively enforce the Treaty and to complement provisions on extraterritorial obligations. Effective cooperation in investigation and prosecutions is also essential in international actions. States should provide extensive cooperation between national judicial and law-enforcement authorities. It is therefore essential that States cooperate in collecting evidence or statements, conduct research, and provide information, including financial and business records. Lastly, States should develop and maintain communications channels and establish, when necessary, joint teams to appropriately assist one another in research and training.

Franciscans International (FI) is an international non-governmental organization with general ECOSOC consultative status, working for the promotion, protection, and respect of human rights, as well as social and environmental justice. Since its establishment in 1989, FI has used advocacy as a tool to combat and curb human rights abuses. FI relies on the expertise and first-hand information of a large network of partners working with the most vulnerable strata of society in approximately 160 countries. From our offices in Geneva and New York, FI works together with grassroots movements and national and international civil-society organizations to advocate at the United Nations for structural changes addressing the root causes of injustice.